IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARRY D. ADELMAN	:	CIVIL ACTION
v.	:	
GMAC MORTGAGE CORP.	:	NO. 97-691

MEMORANDUM AND ORDER

HUTTON, J. February 2, 1998

Presently before the Court is the Plaintiff's Motion in Limine for the Exclusion of After Acquired Evidence (Docket No. 27). For the reasons stated below, the plaintiff's motion is **GRANTED in part and DENIED in part**.

I. BACKGROUND

During his deposition, the plaintiff admitted that he intentionally omitted information concerning a prior job on his resume and application for employment. Adelman Dep. at 50. Moreover, the plaintiff testified that his resume incorrectly stated that he had worked for one employer for a year and a half, even though the plaintiff had actually worked for the employer for only three months. Adelman Dep. at 57.

On January 28, 1998, the plaintiff filed a Motion in Limine, seeking to exclude the admission of this “after-acquired evidence.” Whether used as a defense to the discrimination claim or as an impeachment devise, the plaintiff argues that the

evidence should be excluded at trial. In the event that the evidence is admitted, the plaintiff requests that the Court bifurcate the trial, or use a limiting instruction to the jury directing that this evidence applies only to the remedies portion of the case.

II. DISCUSSION

1. Admissibility of the Resume and Application Under Rule 608

The plaintiff seeks to prevent the defendant from inquiring about the plaintiff's misrepresentations on his resume and application during the defendant's cross examination of the plaintiff. In the alternative, the plaintiff argues that the defendant should be barred from offering extrinsic evidence regarding the misrepresentations.

Generally, Federal Rule of Evidence 608(b) precludes a party from introducing extrinsic evidence to impeachment a witness. Moreover, Rule 403 requires a court to balance the probative value of a cross-examination under Rule 608 against the danger of unfair prejudice. United States v. Coleman, 805 F.2d 474, 483 (3d Cir. 1986) (citing Fed. R. Evid. 608(b) advisory committee's note).

However, Rule 608(b) allows a party to inquire into specific instances of conduct where such conduct would be

probative of a witness's character for truthfulness.[1] Moreover, where a "witness whose credibility is challenged concedes the alleged acts" and "where . . . credibility is the critical issue," "there is no need . . . to invoke rule 608(b)'s ban on extrinsic evidence." Carter v. Hewitt, 617 F.2d 961, 971-72 (3d Cir. 1980).

In the instant matter, the plaintiff admits that he "knowingly" made misrepresentations on his resume and application. Adelman Dep. at 61. Such a misrepresentation is clearly probative of the plaintiff's character for untruthfulness. See United States v. Elliot, 89 F.3d 1360, 1367 (8th Cir. 1996), cert. denied, 117 S. Ct. 963 (1997). Accordingly, the defendant is entitled to inquire into the plaintiff's misrepresentations during cross-examination, under Rule 608(b).

Moreover, the plaintiff readily admitted to his misrepresentations in his deposition. It is apparent by

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1. Under Federal Rule of Evidence 608(b),

> [s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Fed. R. Evid. 608(b). This rule "is intended to be restrictive and the inquiry on cross-examination should be limited to specific modes of conduct which are generally agreed to indicate a lack of truthfulness." 3 J. Weinstein & M. Berger, Evidence ¶ 608[05] (1975).

reviewing the defendant's Motion for Summary Judgment, and the plaintiff's response thereto, that the plaintiff's credibility will be a critical issue. Accordingly, "there is no need to invoke rule 608(b)'s ban on extrinsic evidence." Carter, 617 F.2d at 971-72. Thus, the defendant may offer evidence regarding the plaintiff's misrepresentations for the purpose of assessing the plaintiff's truthfulness and credibility.[2]

2. Use of "Resume Fraud" as a Defense to a Title VII Claim

The United States Supreme Court recently discussed the admissibility of after-acquired evidence in a discrimination suit. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995). In McKennon, the Supreme Court held that after-acquired evidence of wrongdoing is not relevant to the liability determination in an ADEA or Title VII case. Id. at 359-60. The employer's motive in ordering the actual discharge is the paramount concern. Id.

The Court did find that after-acquired evidence may be relevant to the remedy stage. Id. at 361-63. However, the employer must meet a certain test before the evidence can be offered. Id. at 362-63. "Where an employer seeks to rely upon

2. The plaintiff claims that the effect of a cross examination regarding the misrepresentations would be too prejudicial. This Court disagrees. The only prejudicial effect that might result is that the jury will make an adverse inference regarding the plaintiff's character for truthfulness. However, that is exactly the reason why the evidence is admissible - for impeachment purposes. Further, the plaintiff's attorney, on redirect, can attempt to rehabilitate the plaintiff by allowing the plaintiff to explain why he misstated his qualifications.

after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." Id. If the employer satisfies this burden, the Court stated that "neither reinstatement nor front pay is an appropriate remedy." Id. at 362. Instead, the remedy, absent extraordinary circumstances, should be the "backpay [calculated] from the date of the unlawful discharge to the date the new information was discovered." Id. at 362.

The United States Court of Appeals for the Third Circuit applied the McKennon rule in a case similar to the instant matter. In Mardell v. Harleysville Life Ins. Co., 65 F.3d 1072 (3d Cir. 1995), the employer, during the discovery process, found that the plaintiff had conducted "resume fraud." The Third Circuit held that the after-acquired evidence was not relevant on the issue of liability, but might be relevant on the issue of remedies. Id. at 1073. The Court agreed that if the defendant "proves that it would have terminated the plaintiff's employment for the reason revealed by the after-acquired evidence," the plaintiff's recovery would be limited to backpay. Id. at 1073-74 (citations omitted). Moreover, the amount of "backpay should run from the discharge to the time that the wrongdoing was discovered, although truly exceptional

circumstances may be considered in fashioning appropriate relief." Id. at 1074

Thus, it is clear from McKennon and Mardell that after-acquired evidence of wrongdoing is relevant only on the issue of remedies. Accordingly, in Mardell the Third Circuit stated that "bifurcation may sometimes be advisable as a vehicle to ensure that after-acquired evidence not be improperly used during the liability phase." Id. at 1073 n. 2. However, "cautionary instructions . . . may render [the need to bifurcate the trial] unnecessary." Id.

In the instant case, the plaintiff contends that the defendant cannot meet the McKennon test. More specifically, he argues that the defendant cannot prove that GMAC would have fired the plaintiff once they found the omissions on his resume and application. Thus, the plaintiff argues that the defendant should not be allowed to offer the evidence in an attempt to limit the plaintiff's remedies. In the alternative, the plaintiff seeks a bifurcated trial or an appropriate limiting instruction, as the Mardell court advised.

In order to meet the McKennon test, the defendant must show that "it would have terminated the plaintiff's employment for the reason revealed by the after-acquired evidence." Id. at 1073-74. Given the limited information before this Court, it is impossible to determine at this stage whether the defendant can

meet this burden. Accordingly, the defendant may offer the after-acquired evidence in an attempt to meet the McKennon test.

Moreover, this Court finds that bifurcation is not necessary. The Third Circuit has left trial courts with the discretion of choosing to bifurcate a trial or grant a limiting instruction when faced with this issue. Mardell, 65 F.3d 1073 n. 2. "The interests served by bifurcated trials are convenience, negation of prejudice, and judicial efficiency. See Fed. R. Civ. P. 42(b). Bifurcation may therefore be appropriate where the evidence offered on two different issues will be wholly distinct, . . . or where litigation of one issue may obviate the need to try another issue." Vichare v. Ambac Inc., 106 F.3d 457, 466 (2d Cir. 1996) (citations omitted).

As explained above, the defendant is permitted to submit evidence regarding the plaintiff's misrepresentations for impeachment purposes. Because the evidence regarding the misrepresentations is admissible under Rule 608(b), the Court cannot prevent the jury from hearing the evidence during the liability phase by bifurcating the trial. Moreover, a limiting instruction will be sufficient "to ensure that after-acquired evidence [will] not be improperly used during the liability phase." Id. at 1073 n. 2. Thus, this Court grants the plaintiff's request for a limiting instruction.

An appropriate Order follows.

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O R D E R

AND NOW, this 2nd day of February, 1998, upon consideration of Plaintiff's Motion in Limine for the Exclusion of After Acquired Evidence (Docket No. 27), IT IS HEREBY ORDERED that the Plaintiff's Motion is **GRANTED in part and DENIED in part**.

BY THE COURT:

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HERBERT J. HUTTON, J.